No. SC86 024

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,

Respondent,

v.

CHAD MADORIE,

Appellant.

Appeal from the Circuit Court of Jasper County, Missouri
The Honorable David C. Dally, Judge

RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from a conviction of the class D felony of driving while intoxicated §577.010, RSMo 2000, obtained in the Circuit Court of Jasper County, Missouri, for which appellant was sentenced to three years in the custody of the Missouri Department of Corrections. The Southern District Court of Appeals reversed appellant's conviction and sentence. State v. Madorie, SD25651, slip opinion (Mo.App. S.D. April 27, 2004). This Court has jurisdiction as it sustained respondent's application for transfer pursuant to Supreme Court Rule 83.04. Article V, § 10, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Chad Madorie, was charged with the class D felony of driving while intoxicated, §577.010, RSMo 2000, in the Circuit Court of Jasper County, Missouri (L.F. 8-9). On March 27, 2003, the cause proceeded to trial before a jury, the Honorable David C. Dally presiding (Tr. 1).

Appellant does not challenge the sufficiency of the evidence to support his conviction. Viewed in the light most favorable to the verdict, the following evidence was adduced: On September 8, 2000, at 1:00 a.m., Officer James Kelly of the Joplin Police Department was dispatched to an accident scene on North Main near the Ozark Christian College campus in Joplin (Tr. 110). He arrived at the scene at approximately 1:15 a.m. and observed a vehicle, a 1994 Mazda Protege, that was facing the road but in the ditch with the nose of the vehicle pointing straight up (Tr. 111). Another officer was already present at the scene (Tr. 111-112). Also present at the scene were two males; one male was speaking to the other officer and the other male, later identified as appellant, was by the vehicle (Tr. 112). The car belonged to appellant (Tr. 150).

Appellant approached Officer Kelly and Officer Kelly noticed that appellant was unstable on his feet, was swaying as he walked, and stumbled from time to time (Tr. 112-113). Officer Kelly asked appellant what happened; appellant stated that he had been driving north on Main Street, had seen a friend walking by, had tried to stop to give his friend a ride, and when he pulled into the driveway, he ran off into the ditch (Tr. 114-115). As appellant told Officer Kelly what had happened, Officer Kelly noticed that there was a strong odor of intoxicants

coming from appellant's breath (Tr. 115). Officer Kelly also noticed that appellant's eyes were watery and bloodshot (Tr. 115). When Officer Kelly asked appellant if he had any alcohol to drink that evening, appellant initially denied drinking; when Officer Kelly again asked, appellant admitted that he had been drinking "a little bit" earlier in the evening (Tr. 117).

Officer Kelly then administered several field sobriety tests (Tr. 117). Appellant failed each of the sobriety tests (Tr. 123, 126, 128). Based on all of Officer Kelly's observations of appellant, Officer Kelly arrested appellant for driving while intoxicated and transported him to the police station (Tr. 129).

At the police station, while discussing appellant's breathalyzer results, appellant told Officer Kelly that "he knew that he was intoxicated, knew he was driving but that I hadn't seen the keys in the ignition, so that he knew that he would get out of it–get out of the trouble with his lawyer" (Tr. 136-137).

Appellant was convicted and was sentenced to three years in the custody of the Missouri Department of Corrections (Tr. 169, 176).

The Missouri Court of Appeals Southern District reversed appellant's conviction and sentence finding that the State had failed to establish the corpus delicti for driving while

intoxicated and thus, appellant's statements to police were improperly admitted[1]. State v. Madorie, SD25651, slip opinion (Mo.App. S.D. April 27, 2004).

This Court granted respondent's motion for transfer on June 22, 2004.

[1]The Court of Appeals did not address appellant's second point raised on appeal that the trial court erred in failing to hold an evidentiary hearing on appellant's motion to suppress. This claim is fully addressed in Point II of this brief.

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN ADMITTING APPELLANT'S STATEMENTS INTO EVIDENCE AS SUBSTANTIVE EVIDENCE BECAUSE THE STATE PROVIDED SUFFICIENT PROOF OF THE CORPUS DELICTI IN THAT EVIDENCE THAT APPELLANT WAS INTOXICATED AND HIS CAR WAS IN THE DITCH CORROBROATED APPELLANT'S STATEMENTS THAT APPELLANT WAS DRIVING WHILE INTOXICATED.

Appellant claims that the trial court erred in overruling appellant's objections and in admitting his confession to Officer Kelly that he was intoxicated and drove his car into a ditch (App. Br. 11). Appellant alleges that his statements were not admissible as there was no independent proof of the *corpus delicti* (App. Br. 11). Appellant claims that before the State could admit appellant's statements that he had been intoxicated while driving his car, the State was required to prove when the call about the accident was made to the dispatcher, when the car ran into the ditch, and whether the driver was intoxicated at the time he drove into the ditch (App. Br. 11).

Corpus delicti consists of two elements: (1) proof, direct or circumstantial, that the specific loss or injury charged occurred, and (2) someone's criminality as the cause of the loss or injury. State v. Ziegler, 719 S.W.2d 951, 954 (Mo.App. S.D. 1986). "The *corpus delicti* of driving while intoxicated consists of evidence that someone operated a motor vehicle while intoxicated." State v. Hammons, 964 S.W.2d 509, 512 (Mo.App. W.D. 1998). "[I]f there is

evidence of corroborating circumstances which tend to prove the corpus delicti and correspond with circumstances related to the confession, both the circumstances and the confession may be considered in determining whether the corpus delicti is sufficiently proved in a given case." State v. Howard, 738 S.W.2d 500, 504 (Mo.App. E.D. 1987) (emphasis added). In other words, *standing alone*, a defendant's extrajudicial confession is insufficient to prove the *corpus delicti* but may be considered along with the corroborating circumstances to establish the corpus delicti. State v. Garrett, 829 S.W.2d 622, 626 (Mo.App. S.D. 1992) (emphasis added). It is "well established that full proof of the corpus delicti independent of the defendant's extrajudicial confessions is not required. . . . On the contrary, what seemed to be only slight corroborating facts have been held sufficient." State v. Nicks, 883 S.W.2d 65, 68 (Mo.App. S.D. 1994) (citations omitted); see also State v. Hammons, 964 S.W.2d 509, 512 (Mo.App. W.D. 1998); State v. McVay, 852 S.W.2d 408, 414 (Mo.App. E.D. 1993); Howard, supra at 504. Therefore, if there is any corroboration of appellant's statements that he was driving the car while intoxicated, his statements were admissible to prove the corpus delicti.

In the case at bar, there is corroboration of appellant's statements. Appellant's vehicle was in a ditch, with the nose of the car pointing up (Tr. 111). Appellant was standing beside his car when Officer Kelly arrived on the scene (Tr. 112). Appellant was unstable, swayed as he walked, and stumbled (Tr. 112-113). Appellant had a strong odor of alcohol on his breath (Tr. 115). Appellant's eyes were watery and bloodshot (Tr. 115). Appellant failed several field sobriety tests (Tr. 123, 126, 128).

This evidence corroborated appellant's statements that he was driving while intoxicated and provided sufficient proof of the corpus delicti. Courts have recognized that the element of driving, in a driving while intoxicated case, may be established by circumstantial rather than direct evidence. The courts have considered various combinations of a variety of factors, including

> location and position of vehicle on or in relation to the roadway, key in the ignition, ignition turned on, engine compartment warm, other mechanisms (*e.g.* lights) running, admission of driving or drinking, recent involvement in a driving accident, and indications of how long the vehicle had been stopped

(citations omitted). Wilcox v. Director of Revenue, 842 S.W.2d 240, 243 (Mo.App. W.D. 1992).

First, the fact that the appellant was discovered at the accident scene, near the car registered in his name, corroborates appellant's admission that he was driving the car. Second, the fact that the officer had been called to an accident scene and the fact that the vehicle was discovered stuck in a ditch, facing the roadway, near a college campus, with its nose pointing up into the air–obviously not a position where people would park their car– corroborates the appellant's admission that he had been drinking and that he had driven the car into the ditch. Third, appellant's bloodshot eyes, his failed sobriety tests, and the strong odor of intoxicants are corroborative of appellant's statement that he was intoxicated at the time he was driving. All of these facts provide more than the "slight corroborating facts" that are necessary to establish the admissibility of the appellant's confession and the *corpus delicti* of the offense.

State v. Johnston, 670 S.W.2d 552 (Mo.App. S.D. 1984) (In prosecution for driving while intoxicated, independent evidence that someone was driving vehicle, lost control, applied brakes, and skidded off pavement was sufficient independent evidence of *corpus delicti* to warrant admission of defendant's statements, even aside from fact that there was also independent evidence pointing to defendant as the driver); see State v. Stimmel, 800 S.W.2d 156 (Mo.App. E.D. 1990) (for similar facts); State v. Hammons, 964 S.W.2d 509, 512 (Mo.App. W.D.1998) (substantial independent evidence that appellant operated a motor vehicle while intoxicated where appellant was the only person at or near the location of the accident, appellant was standing by the car when officers arrived, the car was flipped over, there was a short skid mark, appellant smelled of alcohol, was later shown to be intoxicated, and appellant was wearing a Superman costume, which apparently did not have any room for him to conceal alcohol). The trial court did not abuse its discretion in admitting the appellant's confession.

Appellant contends that because the State did not prove, independent of his confession, "when the call was made to the dispatcher, or when the car ran into the ditch, or whether the driver, at that time, was intoxicated," his confession was inadmissible and the State failed to establish the corpus delicti. Appellant's argument is premised upon his mistaken belief that the State has the burden of establishing all of the essential elements of a crime without relying on a defendant's extrajudicial admissions, statements or confessions. However, as discussed above, full proof of the corpus delicti independent of the defendant's extrajudicial confessions

is not required; only slight corroborating facts are necessary. Nicks, 883 S.W.2d at 68. The State was not required to prove each element prior to admitting appellant's statements.

Appellant also contends that the State failed to establish "independent evidence as to which man was driving the vehicle," apparently referring to the other individual present at the scene when officers arrived (App. Br. 14). Relying on the Western District Court of Appeals opinion in State v. Friesen, 725 S.W.2d 638 (Mo.App. W.D. 1987), appellant alleges that because there was another person present at the scene, the State was required to present evidence, independent of appellant's admissions, that appellant rather than the other person present, was the person driving the vehicle (App. Br. 14). However, the State is not required to present independent proof of the defendant's criminal agency, outside of the defendant's admissions, to establish the corpus delicti. State v. Stimmel, 800 S.W.2d 156, 158 (Mo.App. E.D. 1990).

In Friesen, supra, relied on by appellant,[2] the Western District found that the State had failed to establish the corpus delicti for driving while intoxicated where the State failed to provide independent proof, outside of the defendant's statements, that defendant had been the person driving the vehicle. The Eastern District in State v. Tillman, 823 S.W.2d 43 (Mo.App. E.D. 1991), recognized that the Western District's position in Friesen, supra was contrary to the Eastern District's position that "proof of the corpus delicti need not include proof of the

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[2]The Southern District Court of Appeals also relied on Friesen, supra, in determining that the State failed to establish the corpus delicti. Madorie, supra, slip opinion at 5-6.

defendant's connection with the crime charged." In fact, the vast majority of case law holds that proof of the criminal agency of the defendant is not required as part of the corpus delicti before admission of the defendant's confession. See State v. Williams, 66 S.W.3d 143, 150 (Mo.App. S.D. 2001) (Proof of the corpus delicti need not include proof of the defendant's connection with the crime); State v. Edgar, 2 S.W.3d 896, 898 (Mo.App. W.D. 1999) ("Proof of a specific defendant's criminal agency is not required; the state's burden is to prove that someone committed the specific crime."); State v. Nicks, 883 S.W.2d 65, 68 (Mo.App. S.D. 1994) (the State was only required to provide " slight corroborating facts" independent of appellant's confession to prove the corpus delicti); State v. Stimmel, 800 S.W.2d 156 (Mo.App. E.D. 1984) (Independent evidence of circumstances which correspond and interrelate with the circumstances described in the statement are sufficient to prove corpus delicti and the defendant's criminal agency is not required); see also State v. Girdley, 957 S.W.2d 250 (Mo.App. S.D. 1997); State v. Hankins, 599 S.W.2d 950 (Mo.App. S.D. 1980); State v. Frentzel, 730 S.W.2d 554 (Mo.App. W.D. 1987). Proof of corpus delicti only requires that the State elicit evidence, direct or circumstantial, that the specific loss or injury charged occurred, and that someone's criminality was the cause of the loss or injury. Ziegler, supra. Contrary to appellant's claim, the State is not required to prove the defendant's criminal agency to prove corpus delicti.

Finally, appellant claims that because his statements were not admissible as substantive evidence as there was no independent proof of the *corpus delicti*, the evidence was insufficient to find him guilty beyond a reasonable doubt and he should be discharged. Appellant appears

to fail to understand the differences between the concepts of sufficiency of the evidence and corpus delicti, which is a rule of admissibility. There is an important distinction between cases of trial error where evidence is improperly received by the trial court, and cases where the evidence is insufficient to sustain a conviction; basically, that "double jeopardy applies only when appellate reversal is based on insufficient evidence." State v. Wideman , 940 S.W.2d 18, 21 (Mo.App. W.D. 1997). In considering whether there is sufficient evidence to support a conviction, an appellate court must consider all evidence that was admitted by the trial court, even if that evidence was erroneously admitted. State v. Kinkead, 983 S.W.2d 518, 519 (Mo.banc 1998). This is because "reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case." State v. Scott, 699 S.W.2d 760, 762 (Mo.App. W.D. 1985). Errors in the admission of evidence are trial court errors that do not implicate the sufficiency of the evidence. See Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 2149, 57 L.Ed.2d 1 (1978); Lockhart v. Nelson, 488 U.S. 33, 109 S.Ct. 285, 290-91; 102 L.Ed.2d 265 (1988). Regardless of whether the State established the corpus delicti, the sufficiency of the evidence is determined including appellant's statements because they were admitted at trial. Appellant's claim, however, is not that the evidence was insufficient to support his conviction; rather, his claim is that his confessions were improperly admitted. Thus, his claim is a claim of trial court error and the proper remedy would be remand for a new trial, not a discharge. Kinkead, supra.

In sum, the trial court did not err in admitting appellant's statements as the State established the *corpus delicti.* Based on the foregoing, appellant's claim must fail.

II.

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S REQUEST FOR A HEARING ON HIS MOTION TO SUPPRESS HIS STATEMENTS, BASED ON AN ILLEGAL ARREST UNDER SECTION 577.039, RSMO 2000 AND ADMITTING APPELLANT'S STATEMENTS FOLLOWING HIS ARREST AT TRIAL BECAUSE APPELLANT FAILED TO MAKE AN OFFER OF PROOF SHOWING HE HAD

EVIDENCE THAT THE TIME BETWEEN HIS VIOLATION AND HIS ARREST WAS MORE THAN AN HOUR AND A HALF WHICH WOULD HAVE INJECTED THE ISSUE INTO THE TRIAL. MOREOVER, ANY ERROR WAS HARMLESS IN LIGHT OF THE OVERWHELMING EVIDENCE THAT APPELLANT WAS DRIVING WHILE INTOXICATED.

Appellant claims that the trial court abused its discretion in denying his motion to suppress his statements due to an alleged violation of Section 577.039, RSMo 2000, which provides that an arrest is lawful only if it is made within one and a half hours after the alleged violation has occurred (App. Br. 17). Appellant claims that he was entitled to a suppression hearing on his motion because he filed his motion prior to trial (App. Br. 17).

On the morning of trial, appellant filed a motion to suppress his statements, claiming that his arrest was unlawful under §577.039, RSMo 2000, and thus, his statements were inadmissible as fruit of the poisonous tree (L.F. 13). The motion court denied appellant's request for an evidentiary hearing, stating, "motion will be denied. We've had probably fifteen motion days on this case. There's been no motion to suppress. The jury's waiting. You can preserve all your arguments for time [sic] the testimony comes in" (Tr. 7). During Officer Kelly's testimony, the State questioned Officer Kelly about statements made by appellant at the police station after his arrest; appellant objected to the admission of those statements based on his earlier motion, but made no offer of proof of evidence that would show whether the arrest occurred more than an hour and a half after appellant was driving (Tr. 136-137). The trial court overruled appellant's objection (Tr. 136-137).

Appellant contending that the trial court overruled his motion to suppress based on an alleged illegal arrest under Section 577.039, RSMo 2000, not that the officer lacked probable cause to arrest appellant. Obviously, there was probable cause for the officer to arrest appellant. The evidence showed that appellant was intoxicated as he smelled of intoxicants, his eyes were watery and bloodshot, he swayed as he walked, he failed multiple sobriety tests, his vehicle was in a ditch with its nose pointed up, and appellant admitted that he had been drinking and driving prior to being arrested. This evidence was sufficient to establish probable cause to arrest appellant. Appellant's claim that his arrest was illegal under Section 577.039, RSMo 2000, does not pertain to whether there was actual probable cause to arrest appellant.

Because appellant failed to make an offer of proof or present any evidence which established that his arrest occurred more than an hour and a half after his violation, appellant failed to inject the issue and the trial court was not in error in denying appellant's request for a hearing.

Section 577.039, RSMo 2000, provides that:

> An arrest without a warrant by a law enforcement officer, including a uniformed member of the state highway patrol, for a violation of section 577.010 or 577.012 is lawful whenever the arresting officer has reasonable grounds to believe that the person to be arrested has violated the section, whether or not the violation occurred in the presence of the arresting officer and when such arrest without warrant is made within one and one-half hours after such claimed violation occurred, unless the person to be arrested has left the

> scene of an accident or has been removed from the scene to receive medical treatment, in which case such arrest without warrant may be made more than one and one-half hours after such violation occurred.

Because this is an exception to the offenses of driving while intoxicated and driving with excessive blood alcohol content, and it is contained in a separate clause disconnected from the definition of those offenses, appellant had the burden of claiming this defense and injecting the issue into the case. State v. Littrell, 800 S.W.2d 7, 12 (Mo.App. W.D. 1991). "The exception is not for the prosecution to negate, but for the defendant to claim as a matter of affirmative defense." Id. "The facts to prove that exceptive proviso, moreover, are peculiarly within the knowledge and private control of the person charged with offense under §577.010," and was for appellant to offer evidence on the exceptive facts. Id. Because the alleged fact that a warrantless arrest of appellant was not within one and one-half hours of the violation does not bear on the criminality of the conduct alleged against appellant or involve a matter or excuse or justification of that conduct, and only bears on the lawfulness of the arrest for that conduct, under the rationale of the criminal code, appellant must inject the issue by evidence that the arrest occurred more than one and one-half hours of the claimed violation. Id. at 12-13. Appellant was not required to offer evidence when he was driving and that he was intoxicated because courts could not compel a defendant to self-incrimination; appellant was only required to present evidence on when he was driving. Id.

For example in State v. Eppenauer, 957 S.W.2d 501, 503 -504 (Mo.App. W.D. 1997), this Court affirmed the defendant's conviction for driving while intoxicated, denying his claim that the State failed to show that the arrest was lawful. This Court found:

> That a warrantless arrest was or was not made within the time limitation does not bear on the criminality of the conduct alleged against a defendant, and the State is not required to prove, as an element of the offense, that the arrest was made within the time limit. State v. Litterell, 800 S.W.2d 7, 12 (Mo.App.1990). Instead, a defendant must inject the issue by evidence that the arrest occurred more than one and one-half hours of the claimed violation to show that the arrest was unlawful. Id. at 13.
>
> At trial, Mr. Eppenauer elicited from Trooper Linear that he did not know when the accident occurred. He argues on appeal that because no evidence was presented of exactly when the violation, driving while intoxicated, occurred, the State was unable to prove that the arrest was made within the statutory time limit. Mr. Eppenauer's argument fails. The burden to prove that the arrest was made more than one and one-half hours after the claimed violation occurred was Mr. Eppenauer's, not the State's. Mr. Eppenauer did not introduce evidence of the time he last drove or the time of arrest. Trooper Linear's lack of knowledge of the time the accident occurred was insufficient, alone, to prove that the arrest took place more than one and one-half hours after the accident. Trooper Linear's testimony regarding the events leading up to the arrest permit a reasonable

> inference that the arrest could have occurred within the statutory time limit. Mr. Eppenauer failed to show that the arrest occurred more than one and one-half hours after the claimed violation occurred. The trial court's finding that the arrest was lawful, therefore, was proper.

Id. at 503-504.

In the case at bar, although appellant filed a motion to suppress prior to trial and a request for hearing was denied prior to trial by the trial court, appellant was required to inject the issue at trial. The trial court informed appellant that he could preserve his objections at trial. Thus, at trial, appellant was either required to offer evidence of when he last drove the vehicle or appellant was required to make an offer of proof. When appellant objected to Officer Kelly's testimony on statements made by appellant after his arrest, in order to inject the issue at trial, it was necessary for appellant to make an offer of proof as to any evidence which would show that the arrest did, in fact, occur more than an hour and a half after appellant was driving. State v. Blackwell, 978 S.W.2d 475, 478 (Mo.App. E.D. 1998). Appellant offered no evidence and no offer of proof. Littrell, supra. (Where the defendant offered no evidence of when his car ceased operation on the highway, he failed to inject the issue into the case, and no basis in fact for exculpation under the exception). Appellant never injected the issue into the trial and the trial court did not err in overruling appellant's objections and admitting appellant's post-arrest statements.

Even assuming that the trial court should have held a motion to suppress on the admissibility of appellant's post-arrest statements and assuming that appellant's statements

were not admissible, appellant's claim still must fail because the admission of these statements were harmless and did not amount to reversible error in this case. Where the trial court abused its discretion in allowing in evidence, the appellant must still show that it was reversible error. State v. Danikas, 11 S.W.2d 782, 792 (Mo.App. W.D. 1999). "To show such error, the appellant must demonstrate not only that the admission of the challenged evidence was erroneous, but also that it was prejudicial." Id. A conviction will be reversed due to admission of improper evidence only where there is a showing of a reasonable probability that in the absence of such evidence the verdict would have been different. Id. In the present case, overwhelming evidence of appellant's guilt of driving while intoxicated was presented, excluding appellant's statement following his arrest that he knew he was intoxicated and he had been driving. The evidence at trial showed that appellant's vehicle was in a ditch, with the nose of the car pointing up (Tr. 111). Appellant was standing beside his car when Officer Kelly arrived on the scene (Tr. 112). Appellant was unstable, swayed as he walked, and stumbled (Tr. 112-113). Appellant had a strong odor of alcohol on his breath (Tr. 115). Appellant's eyes were watery and bloodshot (Tr. 115). Appellant failed several field sobriety tests (Tr. 123, 126, 128). When Officer Kelly first arrived on the scene, he asked appellant if he had any alcohol to drink that evening, appellant initially denied drinking; when Officer Kelly again asked, appellant admitted that he had been drinking "a little bit" earlier in the evening (Tr. 117). Officer Kelly asked appellant what happened; appellant stated that he had been driving north on Main Street, had seen a friend walking by, had tried to stop to give his friend a ride, and when he pulled into the driveway, he ran off into the ditch (Tr. 114-115).

This evidence established that appellant had been driving while intoxicated and was overwhelming evidence of appellant's guilt. The admission of appellant's subsequent statements made after his arrest–that he knew he was intoxicated and that he drove the car–was harmless under the circumstances and did not result in prejudice to appellant. The trial court did not commit reversible error in failing to conduct a suppression hearing.

If this Court finds that a remand is necessary to determine the admissibility of appellant's statements following his arrest and that the error was not harmless, the proper remedy for erroneously failing to hold a hearing outside the presence of the jury is a limited remand for the trial court for a post-trial hearing on the issue of the admissibility of the statements. State v. Mitchell, 611 S.W.2d 211, 214 (Mo. banc 1981); State v. Brown, 755 S.W.2d 749 (Mo. App. E.D. 1988);[3] State v. Edwards, 30 S.W.3d 226, 231 (Mo.App. E.D. 2000)[4].

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[3] In Brown, although the trial court erred in failing to hold an evidentiary hearing where the defendant filed his motion to suppress the morning of trial, the Eastern District Court of Appeals did not remand the case for an evidentiary hearing because appellant's claim that his arrest was unlawful because the officer lacked probable cause was refuted by the record as the testimony during trial established that the arrest was lawful. Brown, supra at 751.

[4]In Edwards, supra, the Court of Appeals set up the following procedure for a post-trial evidentiary hearing:

> 1. We remand for a full evidentiary hearing on the voluntariness issue requesting a determination and finding by the trial court whether the statements to police

The trial court did not err in denying appellant's request for a hearing because appellant had the burden of injecting evidence that the violation occurred more than an hour and half before the arrest; appellant failed to introduce any evidence or make an offer of proof. Furthermore, the evidence of appellant's guilt was overwhelming and the admission of those statements were harmless.

Based on the foregoing, appellant's claim must fail.

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were voluntary or involuntary. If, after such hearing, the trial court finds and determines that they were involuntary, the judgment shall be set aside and the trial court shall grant a new trial on all issues, without the statements being admitted in evidence.

2. However, should the trial court find and determine that the statements were voluntary, then it shall certify the transcript of the hearing, along with its determination and findings to this Court to be made a part of the transcript in the cause for determination and disposition of the appeal upon the record as supplemented.

CONCLUSION

In view of the foregoing, respondent submits that appellant's conviction and sentence be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b)/Local Rule 360 of this Court and contains 5,208 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 29th day of August, 2004.

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